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IN THE

SUPREME COURT of the UNITED STATES

October Term, 1962

No. 1008

W. R. ARTHUR & CO., INC.,

Appellant,

vs.

WISCONSIN DEPARTMENT OF TAXATION,

Appellee.

APPEAL FROM THE SUPREME COURT
OF THE STATE OF WISCONSIN

MOTION OF APPELLEE TO DISMISS APPEAL AND BRIEF

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MOTION TO DISMISS

Pursuant to Rule 16 of the Revised Rules the appellee, Wisconsin Department of Taxation, moves this court to dismiss with costs the appeal taken herein to this court by W. R. McArthur & Company, Inc., upon the following ground:

1. No substantial Federal question is presented.

STATEMENT OF THE CASE

This is a state income tax apportionment case. The appellant, W. R. Arthur & Co., Inc., is a corporation, incor-

porated in Illinois, but having its office and place of business at Janesville, Wisconsin. It is engaged in a unitary, multi-state business of transporting new Chevrolet automobiles and trucks from the manufacturer's assembly plant at Janesville, Wisconsin to the dealers in the midwest. It seeks a review of the judgment of the Supreme Court of Wisconsin which affirmed an assessment of Wisconsin income taxes against the appellant on the part of the net income of the appellant in the years 1953 through 1956 attributable to business transacted within the State of Wisconsin. The amount of its total net income in each of the years so attributed to business transacted within Wisconsin and subjected to Wisconsin income taxation was calculated, pursuant to sec. 71.07 (2) Wisconsin Statutes, by the application of an apportionment formula composed of three factors: (1) revenue miles, (2) payroll, [non-driver payroll assigned a situs where headquartered and driver payroll assigned a situs on basis of revenue miles], and (3) originating revenue [assigned a situs at place of receipt].

STATUTES INVOLVED

Sec. 73.02, Wisconsin Statutes, creates the appellee, Wisconsin Department of Taxation, as a department of state government of the State of Wisconsin. The duties of said department as set out in sec. 73.03, Wisconsin Statutes, include the general supervision of the administration and enforcement of the state income tax imposed by ch. 71, of the Wisconsin Statutes. It is the governmental agency or subdivision by which the State of Wisconsin administers its income tax laws. The Wisconsin Department of Taxation is fully authorized by the Wisconsin Statutes to make

the additional assessment involved. As no question is raised in respect thereto the statutory authority for it to so act is not set out.

The provisions of the Wisconsin Income Tax Law are in ch. 71 of the Wisconsin Statutes. So far as relevant here they are set forth at pages 4, 5 and 6 of the Appellant's Jurisdictional Statement. It is provided in sec. 71.07(2), that the amount of income of persons [includes corporations by express definition sec. 71.02(1)], engaged in business within and without the State of Wisconsin shall be taxed only on such income as is derived from business transacted within the state; that if the business transacted in the state is not part of a unitary business the amount of income attributable to Wisconsin may be determined by separate accounting; but where the business is unitary then the amount of Wisconsin taxable income is to be determined by a three factor formula composed of (a) tangible property, (b) cost of manufacturing, and (c) sales. It is then provided in sec. 71.07 (3), that if the use of any of the three factors produces an unreasonable or unequitable result such factor or factors may be omitted from the formula. Then sec. 71.07 (5), provides that if, by any of the foregoing, the income properly assignable can not be ascertained, then the income shall be apportioned and allocated upon such basis as the Wisconsin Department of Taxation may, in accordance with its rules and regulations, prescribe. Because the use of the three-factor formula was inappropriate to the taxpayer's business and as dropping out factors therein did not provide a reasonable method for apportionment, the Wisconsin Department of Taxation applied an apportionment formula consisting of revenue miles, payroll and originating revenue as deemed

to be an apportionment formulua which fairly and reasonably apportioned to Wisconsin that portion of the net business income of the appellant as was attributable to business conducted within Wisconsin. This was in accordance with the promulgated formal published rule of the Wisconsin Department of Taxation, designated Tax 2.45, as set forth at page 6 of Appellant's Jurisdictional Statement.

FACTS

While the appellant, W. R. Arthur & Co., Inc., is a corporation incorporated in Illinois, it has its general office and place of business at Janesville, Wisconsin, adjacent to the Chevrolet automobile assembly plant of General Motors Corporation. The sole business of the appellant is the transporting of new Chevrolet automobiles and trucks from said assembly plant, to dealers in Wisconsin, Illinois, Indiana, Iowa, upper Michigan, Minnesota, Missouri, Montana, Nebraska and North and South Dakota. Other than a garage relay station which is owned at Black River Falls, Wisconsin, a minor relay station rented at Manchester, Iowa and an experimental operation conducted out of motel locations in Minnesota, the W. R. Arthur & Co., Inc., had no office or facility other than its office and receiving and dispatching terminal facility at Janesville, Wisconsin.

Taxpayer's business was entirely the hauling of one commodity, new Chevrolet automobiles and trucks from the manufacturer's assembly plant to the dealers in such new vehicles. It had only one customer, the Chevrolet division of General Motors Corporation at its assembly plant at Janesville, Wisconsin. The new automobiles and

trucks were moved by appellant by two methods. 96% were moved by the "haulaway," also known as the "truck-away," method and 4% were hauled or transported by being driven under their own power by employees of the taxpayer, which is known as the "driveaway" method. The "haulaway" method consisted of the transportation of the new vehicles upon specifically designed semi-trailers carrying either four new Chevrolet automobiles or three new Chevrolet trucks, drawn or pulled by power units,—heavy duty trucks known as truck-tractors.

All of the transportation actually originated at the Chevrolet plant at Janesville, Wisconsin. Beyond question, 98% of the hauling of new vehicles was started at the Janesville plant. Such other hauling as was done was nominal in amount and insignificant. It involved the movement of new vehicles between auto shows at the start of a model year, some readjusting of inventory between dealers at the end of a model year, the return of new cars from Chevrolet dealers to the factory at Janesville, and the movement of some new trucks from Streeter, Illinois, after the installation of special dump boxes there, which trucks had been initially transported by the taxpayer from the Janesville plant to Streeter, Illinois for such installation. All of the hauling, regardless of where the haul at the time originated, was for the Chevrolet division of General Motors Corporation and was performed under tariffs negotiated by the taxpayer's officers headquartered at Janesville, Wisconsin.

The taxpayer's revenue was entirely from the Chevrolet plant at Janesville for which all of such transportation service was performed. Taxpayer was a contract carrier and the Chevrolet division of the General Motors Corpora-

tion was its only customer and the only one for which taxpayer was authorized to perform transportation services. All billing by the taxpayer was to said Chevrolet division of the General Motors Corporation. Taxpayer took possession of the new Chevrolet automobiles and trucks at the factory gate at Janesville, stored them at its facilities at Janesville, loaded them onto trailers, transported them by said truck and semi-trailers or drove them to the specified Chevrolet dealers to whom they were consigned by the Chevrolet factory, and thereon unloaded and delivered them. For this service, it was compensated under agreements with the Chevrolet division pursuant to which the W. R. Arthur & Co., Inc., received a certain amount for actual miles transported plus surcharges for other services, plus allowances for extra driver expense on long hauls (driver lodging) and extra driver expense of unloading LTL shipments—shipments where the load goes to more than one dealer. The basis for the compensation from January 1, 1953 to 1955 was nine cents per mile for each vehicle transported, plus a surcharge of three dollars per car, plus a further surcharge of seventy-five cents per car for each 150 miles after the first 150 miles. If all of the vehicles on the load were not consigned to a single destination, the taxpayer received an additional $1.50 for each vehicle on that load. Subsequent to June 20, 1955, and during the remainder of the period involved, the rates were scaled upward slightly, but on this same scheme or pattern.

The general offices were located at Janesville, Wisconsin in a 40x60 feet two story building known as the Cherry Street office owned by it, upon leased land. The officers of the corporation with an executive payroll of $100,000 a year headquartered there. The officers were responsible

for the conduct of the business, including the negotiations with General Motors Corporation relative to the retention of business and the determination of terms; the purchase of trucks and trailers from General Motors Corporation; the negotiation of union contracts; and the negotiation with state and federal regulatory agencies. In addition, this office housed the claims department, the safety and personnel division, the accounting personnel, and a number of other office work. Altogether there were from twenty to twenty-four office workers employed in various capacities, including the settlement of claims and driver training. The general corporate records were maintained there. The principal dispatchers were headquartered at Janesville. In the latter part of 1956 taxpayer constructed a new 40x70 feet office building on what is known as the Kellogg Street lot which it used for dispatching.

In addition to its offices, appellant during the years involved, operated two large garages at Janesville, a large parking lot at Janesville and had a large garage at Black River Falls, Wisconsin.

The two Janesville garages were located on State Street and Academy Street respectively. The State Street garage was a 200 foot by 60-70 foot building on land owned by the taxpayer. It had drive-through bays with electrically operated overhead doors that could accommodate loaded tractors and trailer units. It was used for greasing, painting, welding, tire repair, brake repair and other like and heavy maintenance of taxpayer's equipment, such as removal and repair and replacement of motors, rear ends and transmissions, and making structural alterations on trailers to accommodate new model Chevrolet automobiles and trucks. There was a stock room for replacement parts for equip-

ment. The Academy Street garage was a two story 100 by 70 feet cement block building and was owned by the taxpayer at a cost of $70,000. Except for brake work and painting it performed the same functions as the State Street garage and similarly had a parts room for storage of tires, motors and repair parts.

Forty to forty-five men worked in these two garages and included shop supervisors, foremen, greasers, tire men, welders, brake men, mechanics and janitors.

Taxpayer took possession of the new Chevrolet automobiles and trucks at the factory gates at Janesville and assumed the risk of loss or damage from that point. About twenty persons were employed by taxpayer to drive new cars from the factory gates to its parking area. Prior to 1956 taxpayer parked the new vehicles on land owned by the Chevrolet division adjacent to the taxpayer's office. In 1956 taxpayer began the development of the Kellogg Street parking area near the factory on eighty acres developed in 1956 for parking purposes and built upon it the 40 feet by 70 feet building used for dispatching purposes. It had also started construction on a large garage to replace the Academy Street garage.

At that time it was using loading docks it had constructed at a cost of $15,000. It had installed a cyclone fence and lighting around the parking area and in the loading area. By the end of 1956 the parking area had been developed to accommodate 2,000 new vehicles. Taxpayer's watchmen checked the area with a twenty-four hour a day watch service. The loading took place at parking areas at all hours of the day and night and in all kinds of weather. Dispatchers were on duty on a twenty-four hour a day

basis. In view of the fact that the Chevrolet cars and trucks were manufactured against specific orders from dealers and identified with serial numbers, the dispatchers at Janesville had to have the cars loaded so as to get the correct cars to the correct dealer and in correct sequence relative to unloading.

Early in 1954 taxpayer finished construction of a two story 100x70 feet garage at Black River Falls, Wisconsin, similar in size and construction to the Academy Street garage at Janesville, which it used for the balance of the period involved. About five to seven shop personnel were there, such as shop supervisors, mechanics, grease and tire men, utility men and clerk. This garage served as a relay point for the changing of drivers and tractors. It was also used to service and inspect equipment, make major and minor repairs to equipment, dispatch equipment and drivers, handle complaints from dealers and hold safety meetings. A full supply of parts, tires and gasoline was kept there. On the relay of a load of new cars and trucks the trailer was detached from the power unit (the tractor-truck), and a new power unit was attached and the load then continued with a fresh driver.

Sometime in 1953 appellant experimented with the establishment of a relay point in the Cedar Rapids, Iowa area and sometime in 1954 established a minor relay operation at Manchester, Iowa in a rented garage building large enough to service three tractors or power units, which had a wash space, parts and supply storage area and a drivers' room. The personnel there consisted of a supervisor, a tire and grease man, three mechanics, a handy man and a clerk. There was a parking space of about four acres for the

tractors and trailers. The fact that the non-driver payroll outside of Wisconsin in 1953 was only $2000 and in 1954 only $6000 indicates that the operation was nominal in those years. With the possible exception of some power units appellant owned no tangible property in Iowa in 1953, 1954 or 1955. In 1955 it had about 30 power units stationed in Manchester, Iowa and in 1956 37 or 38.

In 1953, 1954 and 1955, and during most of 1956, taxpayer had no relay facility in Minnesota. In the latter part of 1956 it began experimenting with the establishment of a relay facility in that state and had an individual on a temporary basis who was headquartered at Black River Falls, working out of a motel there, but seeking a relay point convenient for hauling from Black River Falls to the Dakotas and Montana. There were 5 to 15 power units involved. It was not until April, 1957 that a relay facility was established at Anoka, Minnesota.

At the Iowa and Minnesota relay points, and at the Black River Falls garage, the tractor-trailer units would be inspected and serviced, the cargo checked, and a new tractor hooked on and the unit dispatched with another driver. Personnel at these relay points sometimes investigated complaints and traced loads.

Of its power units about 200 were stationed at Janesville, about 60 at Black River Falls, about 30 at the Iowa terminal and in the latter part of 1956 from 5 to 15 at the experimental relay point in Minnesota. Except for some minor maintenance in 1955 and 1956 at Manchester, Iowa, all the tractors and semi-trailers were serviced and repaired in the taxpayer's two garages in Janesville, Wisconsin and in its Black River Falls, Wisconsin garage.

Except for its rolling stock which operated within and without Wisconsin, and only a small amount of tools, parts, tires and gasoline in Iowa in the latter part of the period involved, the taxpayer owned no tangible property outside of Wisconsin.

Taxpayer filed Wisconsin income tax returns for each of the four years involved as a unitary business and therein apportioned its net business income to within and without Wisconsin using the single line-haul factor of revenue miles. Following an audit and a hearing, the Wisconsin Board of Tax Appeals affirmed an additional assessment which apportioned a part of the taxpayer's net income in each of the years to Wisconsin by using a three-factor formula of: (1) revenue miles [line-haul], (2) originating revenue [terminal], and (3) payroll—with non-driver payroll assigned to work headquarters and driver payroll spread on revenue miles basis [neutral or mixed line-haul and terminal].

The percentages produced by the use of such factors and the average thereof in the formula were as follows for each of the years:

	1953	1954	1955	1956
Payroll	69.445%	64.560%	64.225%	64.545%
Revenue Miles	55.776%	49.977%	51.214%	50.858%
Originating Revenue	100. %	100. %	100. %	100. %
Divided by 3	225.221%	214.537%	215.442%	215.403%
Average (Wis. %)	75.074%	71.512%	71.814%	71.801%

The payroll factor was determined by allocating to Wisconsin all non-driver personnel whose headquarters were in Wisconsin, and by dividing driver personnel payroll between Wisconsin and other states on the basis of revenue miles within and without the state. The revenue miles factor was simply the percentage which the taxpayer's revenue miles in Wisconsin bore to total revenue miles. The originating revenue factor was 100% Wisconsin because all of taxpayer's revenue was received at the Janesville main office as a result of contracts entered into by said main office personnel.

It is this assessment of additional Wisconsin income taxes for these years which was affirmed by the Supreme Court of the State of Wisconsin by the judgment herein sought to be reviewed.

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

1. *Each factor in an apportionment formula is reasonable if the formula is reasonable.*

The sole basis asserted by the appellant in support of this appeal is that the use of originating revenue as one of the three factors in the formula used in making the apportionment of the appellant's net business income makes the tax one on gross receipts and therefore renders the use of such apportionment formula invalid. It makes this assertion notwithstanding that originating revenue is only one of three factors in the formula and that appellant acknowledges that its income attributable to Wisconsin must be determined by an apportionment formula.

It is evident that it takes this position due to the fact that originating revenue is 100% Wisconsin because the entire revenue of the appellant in each of the years was received at its main office and plant at Janesville. In substance, this is the same position that the appellant took before the Supreme Court of the State of Wisconsin, which was that each factor in an apportionment formula standing by itself and used alone, must be a reasonable basis for apportionment of the net income. This obviously is a fallacious position.

In this case the originating revenue is the gross receipts and is used the same as sales in the three-factor statutory formula that would be applied if appellant were a manufacturing concern. The Supreme Court of Wisconsin addressed itself to the appellant's contention and said that the use of the originating revenue or gross receipts factor did not make the formula arbitrary or render the apportionment unfair. It said that inclusion of originating revenue as one of the factors in the three-factor formula constituted a reasonable means of reflecting the taxpayer's income attributable to business done in Wisconsin. It said the formula took into consideration the peculiar nature of the taxpayer's business activity and that it had only one customer and it was in Wisconsin and that the taxpayer was headquartered in Wisconsin.

The Supreme Court of Wisconsin recognized, as does appellee, that, used as a single factor for apportioning multistate income, gross receipts would result in all of the taxpayer's income being taxed in Wisconsin and that this obviously would make the tax unfair and illegal. It said, however, that when it is used in conjunction with two other

factors, it does not make the formula arbitrary or result in an unfair apportionment of the income.

If the position of the appellant were sound, then all that would be needed in an apportionment formula is only one factor. But, the use of a formula composed of more than one factor is due to the very fact that the end result produced by the formula cannot be achieved by using only one factor. This is inherent in the use of a formula to spread income territorily between states. There are a number of factors which, if applied alone, would produce absurd and erroneous results. Yet, when used with other factors, they would result in achieving a proper apportionment. If the result of the formula is reasonable, then the factors in it are all reasonable.

As the Supreme Court of Wisconsin said in its opinion:

". . . If one of several factors is challenged, it must be evaluated by the court not only upon its own merits but also in relation to the other factors, as well as in relation to the total composite result. Thus, the court must look not only at the individual factors but also at the final formula. We believe that in context with each of the other factors included in the formula adopted by the board of tax appeals in the instant case, the factors are all reasonable.

"When a multi-factor formula is used, each factor must bear a reasonable relationship to the taxpayer's business and to the other factors of the formula; it must also produce a fair apportionment when set in combination with other germane factors. The test is not whether, standing alone, a given factor produces a fair apportionment."

2. *Apportionment formula used was fair and reasonable.*

It is related to the unique or peculiar type of business of the appellant. The appellant is engaged in the business of transportation of freight. Traditionally and actually the transportation business is recognized, even by itself, as having two major aspects or facets of its operation which contribute to the success of the entire business, to wit: the terminal activities and the line-haul activities. A fair and reasonable apportionment formula must thus be composed of elements which give effect to the contribution of these two distinct segments of the operation. If these features of the trucking business are to be recognized and used to apportion net income of a multi-state truck operation the apportionment formula must include factors that take cognizance of them.

The line-haul part is the actual movement over the highways of the vehicles in carrying the freight. The terminal portion is very important and necessary part of the business and includes the contribution of the general office in obtaining, managing and keeping the business. There is nothing to suggest that the line-haul predominates over terminal in contributing to the net income from the entire operation. Therefore, it is reasonable that they are assumed to be equal in such contribution and being equal it is only reasonable to give them equal weight in the end-result formula used. The three-factor formula used here of revenue miles, payroll and originating revenue attributes to each of the major elements—line-haul and terminal—and to the labor and capital employed in each, an equal contribution to the net income from the entire operation of the business.

The revenue miles factor is entirely line-haul in nature. Ordinarily ton-miles would be used but here revenue miles were used as the taxpayer used revenue miles in filing its returns and no records for computation of ton-miles were available. Revenue miles reflects the contribution of both the labor and capital involved in the actual hauling and assigns them to where the hauling is done.

The originating revenue factor is terminal, and is comparable to and takes the place of, the sales factor that would be used in the statutory formula which would be applicable if the taxpayer were a manufacturer. Originating revenue reflects the contribution of labor and capital involved in the functioning of the general office and operating terminal (including the garages, etc.) at Janesville, Wisconsin and the fact that all of the services were supervised and directed at such home office and originating terminal.

The payroll factor is neutral, or rather both line-haul and terminal in character, and serves to balance or coordinate the other two factors. In computing the payroll factor the non-drivers were allocated on the basis of the location of their headquarters and the drivers were allocated on the basis of revenue miles. Thus, the payroll reflects labor and capital contributions to the line-haul movement and also the labor and capital contributions to the terminal activity, including the minor relay operations outside of Wisconsin, at the place where those contributions are made. It also reflects the contribution of labor and capital involved in the functioning of the general office and the originating terminal including the garages, etc., at Janesville, Wisconsin and the fact that all of the hauling service was sold, contracted for and generally implemented, directed and supervised by such home office.

Thus, the apportionment formula used in the case was eminently fair and reasonable as calculated to attribute to Wisconsin only that portion of the total net income of the taxpayer as was derived from that part of the business which was transacted and carried on in Wisconsin. Being fairly apportioned by such a formula, the assessment was proper and the taxes involved are valid.

3. *Apportionment of unitary income by a reasonable formula is constitutional.*

It is well established that the net income of a corporation generated by interstate as well as intrastate activities, may be fairly apportioned for tax purposes by a formula utilizing in-state aspects of interstate affairs. *Butler Bros. v. McColgan* (1942), 315 U. S. 501, 62 Sup. Ct. 701, 86 L. Ed. 991; *ET&WNC Transp. Co. v. Currie* (1959), 359 U. S. 28, 79 Sup. Ct. 602, 3 L. Ed. (2d) 625, affirming 248 N. C. 560, 104 S. E. (2d) 403; *N. W. States Portland Cement Co. v. Minnesota* (1959), 358 U. S. 450, 79 Sup. Ct. 357, 3 L. Ed. (2d) 421.

Appellant relies upon *Central Greyhound Lines v. Mealey* (1948), 334 U. S. 653, 68 Sup. Ct. 1260, 92 L. Ed. 1633. That case is in no way pertinent for two reasons. In the first place, it was a gross receipts tax and this court has clearly distinguished between a gross receipts tax and a net income tax. Secondly, the tax there was an unapportioned tax which by its very nature makes interstate activity bear more than its fair share. *N. W. States Portland Cement Co. v. Minnesota* (1950), 358 U. S. 450, 79 Sup. Ct. 357, 3 L. Ed. (2d) 421. However, in the instant case, the tax is laid on an amount that is very carefully apportioned so as to limit

the tax to the amount of net income that is reasonably attributable to business done in Wisconsin.

Hans Rees Sons v. N. C. (1931), 283 U. S. 123, 51 Sup. Ct. 385, 75 L. Ed. 879, is not similar to the instant case. It involved a single factor apportionment formula—a property factor. The tax was unreasonable on its face if, as this court has held, net income derives from both capital and labor. *Stratton's Independent LTD v. Howbert* (1913), 231 U. S. 399, 34 Sup. Ct. 136, 58 L. Ed. 285; *Eisner v. MacComber* (1919), 252 U. S. 189, 40 Sup. Ct. 189, 64 L. Ed. 521. There the State of North Carolina overtaxed because it had most of the property and under its formula nearly all of the income, although there was substantial labor that was employed elsewhere.

The case of *N. W. States Portland Cement Co. v. Minnesota* (1959), 358 U. S. 450, 79 Sup. Ct. 357, 3 L. Ed. (2d) 421, furnishes no support to the appellant. It and the companion case, *Williams v. Stockham Valves & Fittings, Inc.* did not involve how much either Minnesota or Georgia could tax, but only whether they could tax at all.

Here, concededly, the State of Wisconsin has power to tax some part of the appellant's net income from its entire business and the controversy is exclusively over how much of that income is to be apportioned to Wisconsin. The apportionment formula used here is reasonable and fair.

As the assessments here involved impose the Wisconsin income tax upon only that portion of the net business income of appellant which is reasonably attributable to the

business done in Wisconsin, no constitutional question is presented as to the validity thereof under the 14th Amendment. Therefore the judgment of the Supreme Court of Wisconsin was correct and the motion to dismiss the appeal should be granted.

Respectfully submitted,

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